

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WESTERN VALUES PROJECT,)
)
Plaintiff,)
)
v.) Case No. 1:19-cv-2138
)
UNITED STATES DEPARTMENT OF THE)
INTERIOR,)
)
Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, as well as agency FOIA regulations, 43 C.F.R. §§ 2.1 *et seq.*, challenging the failure of the United States Department of the Interior ("Interior") to fulfill the requests for information made by plaintiff Western Values Project.

2. Plaintiff seeks declaratory relief that defendant is in violation of the FOIA for failing to fulfill plaintiff's requests for records, and injunctive relief that defendant immediately and fully comply with plaintiff's requests under the FOIA.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 702, which gives the Court jurisdiction over agency actions where an aggrieved party has suffered a wrong within the meaning of a "relevant statute," here the FOIA. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this District under 5 U.S.C. § 703, 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

4. Plaintiff Western Values Project is a public interest organization that gives voice to Western values in the national conversation about energy development and public lands conservation. Western Values Project uses the information it gathers, and its analysis of that information, to educate the public through reports, press releases or other media. Western Values Project also makes the material it gathers available on its public website.

5. Defendant Interior is an agency within the meaning of 5 U.S.C. § 552(f)(1). Defendant is the federal agency with possession and control of the records responsive to plaintiff's requests and is responsible for fulfilling the FOIA requests of plaintiff.

STATUTORY FRAMEWORK

The Freedom of Information Act

6. The FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

7. An agency must respond to a party making a FOIA request within 20 working days, notifying that party of at least the agency's determination whether or not to fulfill the request, and of the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

8. In "unusual circumstances," an agency may delay its response to a FOIA request but must provide notice and must also provide "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B).

9. This Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

10. The FOIA provides a mechanism for disciplinary action against agency officials who have acted inappropriately in withholding records. Specifically, when requiring the release of improperly withheld records, if the court makes a written finding that “the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously,” a disciplinary investigation is triggered. 5 U.S.C. § 552(a)(4)(F).

11. Interior has FOIA regulations mandating its requirements to respond to FOIA requests. 43 C.F.R. §§ 2.1 *et. seq.*

FACTS GIVING RISE TO PLAINTIFF'S CLAIMS FOR RELIEF

The Department of Interior's Political “Awareness Process.”

12. Since the enactment of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, federal agencies generally have implemented their obligations under the Act in a straightforward manner, without political interference.

13. Defendant Interior broke with this longstanding position on May 24, 2018, when it issued a policy entitled “Awareness Process for Freedom of Information Act Productions.” Memorandum from Cindy Cafaro, Departmental FOIA Officer, to Assistant Secretaries.¹ Interior released an updated political “Awareness” policy on February 28, 2019. Memorandum from Cindy Cafaro, Departmental FOIA Officer, to Assistant Secretaries.²

14. The Awareness Process requires all agency personnel processing FOIA requests to “search responsive calendars, emails, and attachments to emails for the names and/or email addresses of ... (a) current Presidentially Appointed, Senate Confirmed (PAS), Non-Career Senior Executive (NCSE), and/or Schedule C employees”; and (b) “[f]ormer Department

¹ See https://www.doi.gov/sites/doi.gov/files/uploads/awareness_process_memo_final.pdf.

² See https://www.doi.gov/sites/doi.gov/files/uploads/awareness_process_memo_2.0.pdf.

employees who left the Department within the last 3 months and were PAS, NCSE, and/or Schedule C employees.” *Id.* If any names or email addresses are identified, the employee must “notify their Bureau contact for awareness reviews,” provide the contact with the responsive records, and allow three days for the contact to review the records. *Id.*

15. The Awareness Process memorandum does not purport to alter the standards or process by which Interior components respond to FOIA requests. However, on May 22, 2019, *Roll Call* published an article revealing that the Department of Interior had been allowing political appointees to “weigh in on which federal records are released to the public, creating delays that could violate open records law and expose the department to legal action.” Jacob Holzman, “Interior Department policy let political appointees review FOIA requests.” *Roll Call*, May 22, 2019, available at <https://www.rollcall.com/news/congress/interior-department-policy-let-political-appointees-review-foia-requests>.

16. Numerous FOIA requests submitted by Western Values Project or its Executive Director, Chris Saeger, have been subject to the “Awareness” review process. For instance, the *Roll Call* article discussed the use of the political Awareness Process in the agency’s response to NPS-2018-00843, a Western Values Project FOIA request to the National Park Service concerning emails between an agency official and Lolita Zinke, the wife of then-Interior Secretary Ryan Zinke. According to *Role Call*, Heather Swift, the Communications Director for then-Secretary Zinke, removed 80 pages of material from the agency’s response to the request.

17. There is a strong public interest in learning the full extent of the involvement of Interior political appointees in processing and formulating responses to FOIA requests. This is particularly so if, as reported by *Roll Call*, political involvement has resulted in the removal of responsive records from FOIA responses.

Plaintiff's FOIA Requests

18. On May 28, 2019, plaintiff submitted by email three FOIA requests to separate components of the Department of the Interior seeking records relating to the so-called “Awareness” policy. Specifically, plaintiff submitted:

- a. a request to the Office of the Secretary (attached hereto as Exhibit A), seeking “all correspondence sent since May 1, 2018, by any political appointee in the Office of the Secretary related to any FOIA submitted by Western Values Project or its Executive Director, Chris Saeger.” The request included, but was not limited to, “all correspondence sent by said political appointees to all permanent and temporary employees who worked in the Office of the Secretary FOIA office as well as all correspondence sent to all FOIA officers at DOI’s associated bureaus, and should include all correspondence where a political appointee discussed, commented on, or conducted a political awareness review of, any FOIA sent in by WVP.”
- b. a request to the Bureau of Land Management (attached hereto as Exhibit B), seeking “all correspondence sent since May 1, 2018, by any political appointee in the Department of the Interior’s Office of the Secretary to anyone in the FOIA office of the Bureau of Land Management, related to any FOIA submitted by Western Values Project or its Executive Director Chris Saeger.” The request “should include all correspondence where a political appointee discussed, commented on, or conducted a political awareness review of, any FOIA sent in by WVP.”

c. a request to the Fish and Wildlife Service (attached hereto as Exhibit C), seeking “all correspondence sent since May 1, 2018, by any political appointee in the Department of the Interior’s Office of the Secretary to anyone in the FOIA office of the Fish & Wildlife Service, related to any FOIA submitted by Western Values Project or its Executive Director Chris Saeger.” The request “should include all correspondence where a political appointee discussed, commented on, or conducted a political awareness review of, any FOIA sent in by WVP.”

19. Plaintiff sought a fee waiver in each request, explaining that the request was made in the public interest because it would contribute to a better understanding of the operations of the federal government. Plaintiff also explained that its request for records is “primarily and fundamentally for non-commercial purposes,” as it is a 501(c)(3) nonprofit organization with no financial interest in the records and will use them to inform the public.

20. As of the date of the filing of this Complaint, plaintiff has received no communications from defendant concerning these three requests.

PLAINTIFF'S CLAIMS FOR RELIEF

COUNT ONE

(Failure to Conduct an Adequate Search)

1. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.
2. Plaintiff submitted requests that reasonably described the records sought and were made in accordance with Interior’s published rules.
3. In response, defendant has failed to conduct a search reasonably calculated to uncover all responsive agency records.

4. Therefore, defendant has violated the FOIA's mandate to search for responsive records. 5 U.S.C. § 552(a)(3)(C).

5. Plaintiff is entitled to injunctive and declaratory relief with respect to the search for the requested records.

COUNT TWO

(Failure to Produce Records Under the FOIA)

6. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

7. Plaintiff properly asked for records within defendant's control.

8. Plaintiff is entitled by law access to the records requested under the FOIA, unless defendant makes an explicit and justified statutory exemption claim.

9. Defendant has not produced all the records responsive to plaintiff's FOIA requests.

10. Therefore, defendant has violated the FOIA's mandate to release agency records to the public by failing to release the records as plaintiff specifically requested. 5 U.S.C. §§ 552(a)(3)(A).

COUNT THREE

(Failure to Provide Fee Waiver)

11. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

12. Plaintiff properly asked for a public interest fee waiver in each of its requests.

13. Plaintiff is entitled by law to receive a public interest fee waiver. Western Values Project is a nonprofit organization dedicated to informing the public regarding issues of public concern. The issue of potential political interference with the processing of FOIA requests is a matter of significant public concern, having generated media attention as well as the attention of

Members of Congress. Plaintiff has no commercial interest in the information and will use it solely to inform the public.

14. Defendant has not granted public interest fee waivers to plaintiff.
15. Therefore, defendant has violated the FOIA's mandate to grant fee waivers when the requests are made in the public interest. 5 U.S.C. §§ 552(a)(4)(A)(iii) and 43 CFR § 2.45.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

1. Declare that defendant has violated the FOIA and agency regulations by failing to conduct an adequate search for records responsive to plaintiff's FOIA requests;
2. Order the defendant to immediately conduct and document an adequate search for responsive records as dictated by plaintiff's requests;
3. Declare that the defendant has violated the FOIA by failing to lawfully satisfy plaintiff's FOIA requests;
4. Order the defendant to release all records responsive to plaintiff's FOIA requests;
5. Order the defendant to grant a public interest fee waiver for all records responsive to plaintiff's requests;
6. Award plaintiff its reasonable attorney fees and litigation costs in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

7. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

By: /s/ Jonathan Massey

Jonathan Massey
MASSEY & GAIL LLP
1000 Maine Ave. SW
Suite 450
Washington, DC 20024
Direct: (202) 650-5452
Fax: (312) 379-0467
jmassey@masseygail.com

Attorney for Plaintiff